

of Hong Leong Investment Holdings Pte. Ltd. Singapore Finance Ltd. is a licensed finance company and has a paid up share capital of \$30,000,000, 75% of which is held by Hong Leong Finance Ltd. King's Hotel Ltd. has an issued and paid up share capital of \$76,400,000, 74.6% of which is held directly or indirectly by City Development Ltd.

In one of his affidavits filed in support of his application, Quek deposes that Gan and he were content to leave detailed planning of the club venture to the majority shareholder Huang and to Chong who was to be an executive of the club and consequently he was not present at every meeting that was held between Huang and the professional advisers to the club. Quek says that he first came to know of the prospectus question at the September 18, 1981 meeting when Winston Chen said he was looking into it. Subsequently, at the November 17, 1981 meeting Winston Chen told the meeting that there was some difference of opinion in Messrs. Shook Lin & Bok (the firm of solicitors of which Winston Chen is a partner) as to the need of a prospectus and that he would discuss the matter with the Registrar of Companies. Quek says that at the February 2, 1982 meeting Winston Chen reported that the Registrar of Companies had given written confirmation that a prospectus was not required and advised that if the directors issued invitations only to their friends such invitations would not be invitations to the public and a prospectus would therefore not be required.

Quek goes on to say in his affidavit that in good faith he accepted and acted upon Winston Chen's advice and that had he known or been advised that a prospectus was required before invitations could be sent out he would have insisted that the law be complied with. He says that the interests of the shareholders, creditors and employees of the 41 companies or of the companies of which he may in future be a promoter or director would not in any way be at risk by his being a director or being concerned or taking part in their management but on the contrary his experience in the Hong Leong Group of companies has been so intimate and extensive that it would be advantageous to the companies, the shareholders, creditors and employees if his application is granted.

In Quek's case, he similarly pleaded guilty to the charge he faced under section 39(4). Also Quek, like Gan is on the Board of CCC (Holdings)

A Ltd. and City Country Club Pte. Ltd. as a nominee of Queens Pte. Ltd. Accordingly, I reject his application for leave to be a director or be concerned in the management of CCC (Holdings) Ltd. and City Country Club Pte. Ltd.

B In respect of Quek's application for leave to be a promoter of any company incorporated or to be incorporated in Singapore I am satisfied, having regard to the factors that a court has to consider, that leave should not be granted.

C In respect of Quek's application for leave to be a director of the other 39 companies named in his application, I am satisfied, after careful consideration of all the relevant factors, that leave should not be granted. However, in respect of his application to be concerned in and take part in the management of those 39 companies, I am satisfied, for the reasons I have given in acceding to Gan's similar application, that Quek should be permitted to take part in their management.

E Accordingly, there will be orders in accordance with this judgment in respect of each of the five Originating Summonses.

The applicants will pay the costs of the Attorney-General.

F *Order accordingly.*

Solicitors: *Lee & Lee; Murphy & Dunbar; Khattar Wong & Partners.*

G
**KIAN HONG HOLDINGS PTE. LTD. v.
OHBAYASHI-GUMI LTD.**

[O.C.J. (Abdul Wahab Ghows J.) October 11, 1983]
[Singapore — Originating Summons No. 242 of 1982]

H *Contract — Construction — Main contract — Sub-contract — Inconsistency — Arbitration Act (Cap. 16), ss. 28 & 28A.*

The claimants sued the respondents for work done under a sub-contract.

I The Arbitrator and the parties consented to refer several questions in dispute to the court for its determination under the Arbitration Act. The facts appear in the judgment.

Held: (1) unless it is clearly stated in the sub-contract one must not assume that the sub-contractor agreed to undertake the risks the contractor accepted under the

main contract. Even greater caution should be exercised when it is apparent that the sub-contractor has indicated in writing that he wishes to avoid such risks, as in this case, by requiring to be paid by pontoon loads;

(2) the quantities stated in clause 1 of the subcontract were varied by the "shop drawings" issued by the respondents' engineers, and with which the claimants had to comply, and such variations of the work which the respondents required the claimants to do must be paid for at the unit rate prices.

ORIGINATING SUMMONS.

Patrick Garland Q.C. (Cheng Tim Pin with him) for the plaintiffs.

David Gardam Q.C. (C.S. Wu with him) for the defendants.

Cur. Adv. Vult.

Abdul Wahab Ghows J.: This application for determination of the various questions of law set out in the Originating Summons herein (No. 242/82) is made pursuant to sections 28 and 28A of the Arbitration Act (Cap. 16).

Ohbayashi-Gumi Ltd, the Defendants/Respondents in these proceedings, were a partner of the consortium which entered into an agreement dated April 3, 1974 (hereinafter called "the main contract") with the Housing & Development Board (hereinafter called "the employer") to construct certain reclamation works known as the East Coast Reclamation Scheme, Phase V, Telok Ayer Basin. Part of the main contract was let out by the Respondents to Kian Hong Holdings Pte. Ltd., the Plaintiffs/Claimants herein. The sub-contract between the Claimants and the Respondents is dated July 13, 1974. The disputes concerning matters in the sub-contract between the two parties arising out of work carried out under the main contract were referred to the Arbitrator nominated by the Council of the Institution of Engineers, Singapore but at an early stage of the arbitration proceedings the parties expressed their wish to refer the following questions of law to the High Court for determination.

Question 1 (as amended by Respondents' counsel):

Whether on a proper construction of the sub-contract, the price for this item should be based on pontoon load measurement as K.H. contends, or on design volume measurement (i.e. measurement of the works done in accordance with con-

tract drawings and specifications) as O.G. contends.

Mr. Garland for the Claimants submitted that Class A stones were to be dumped on the filter cloth placed on the surface of the sand in the trench dug in the sea bed and Class B stones were to be placed on the inside slope of the stone bund according to clause 46 of the specifications of the main contract. As the main contract was a lump sum contract there was no need to provide a method of measuring the stones required for the aforesaid work (apart from variations). In the sub-contract there were two clauses which referred to the supply of Class A and B stones to be placed on the stone bund as follows:—

"PART I (of sub-contract)

1. (a) *Formation of Stone Bund comprising*
- (1) Supply and Place of approximately 329,500 cubic metres of Class A Stone/rock according to all contract drawings and as specified @ \$34.60 per cubic metre ... S\$11,400,700.00
 - (2) Supply and Place of approximately 21,870 cubic metres of Class B Stone/rock according to all contract drawings and as specified @ \$39.40 per cubic metre ... S\$861,678.00

2. The sub-contractor agrees to execute or omit to execute any item of the works mentioned above as ordered by the employer or contractor by way of measured variation at unit rate prices stated above. Quantities stated above shall not be taken to define or limit the extent of any work to be done by the sub-contractor in the execution and completion of the above sub-contract works."

Mr. Garland then referred to item 7 of the Appendix attached to the sub-contract and made reference to a letter dated February 7, 1974 from the Claimants to the Respondents which contains the Claimants' revised quotation for the works to be carried out under the sub-contract and on page 2 thereof appear the following conditions relevant to this cases:—

"The Housing & Development Board Contract will be generally applied unless otherwise specified below:—

- (a)
- (e) Ohbayashi-Gumi to provide all Filter Cloth materials;
- (i) As your offer to H.D.B. is on an Alternative Design, our measurement for Class A and B stone shall be measured on pontoon before discharged by machine. Measurement for Rip-Rap shall be on constructed areas;
- (j) Escalation Clause shall include Fuel, Cement, Steel, $\frac{3}{4}$ Aggregate and Wages."

Mr. Garland added that as condition (i) in page 2 of the letter dated February 7, 1974 contained the only reference to the method of mea-

sureing the volume of Class A and B stones to be dumped on the filter cloth it could not be said to be inconsistent with any other conditions in the sub-contract. According to Mr. Garland, the revised quotation and all the other terms and conditions in the Claimants' letter dated February 7, 1974 were accepted by the Respondents during the negotiations between the representatives of the Claimants and the Respondents. The Respondents should have crossed out with a red pencil condition (i) in page 2 of this letter if this condition was not acceptable to them. But the Respondents did not object and sent this letter on to their solicitors to be incorporated into the sub-contract. Now it was too late for the Respondents to claim that they did not accept the condition that the Class A and B stones should be measured by the pontoon loads.

Mr. Gardam for the Respondents replied that the Claimants' letter dated February 7, 1974 had not been accepted by an unqualified "I accept". There is a note under item 7 in the Appendix which referred to this letter and which states:—

"In case there is any inconsistency between this letter and the sub-contract the conditions in the sub-contract is applicable."

Mr. Gardam added that condition (i) in page 2 of this letter was inconsistent with various provisions in the sub-contract and the main contract. According to him, clause 1 of Part I of the sub-contract provided that Class A and B stones were to be supplied and placed according to all contract drawings and as specified. This meant that the Respondents were only liable to pay for Class A and B stones on design volume measurements i.e. measurement of the works done in accordance with the contract drawings and specifications. He added that design volume measurements did not include waste caused by over-dumping or loss owing to subsidence or the action of currents etc. Mr. Gardam said that to agree to pay for the stones by pontoon loads would be an invitation for careless work. In this case the Claimants were guilty of a technical breach of contract by wasting stones by over-dumping.

When asked why clause 1 of Part I of the sub-contract gave approximate figures of the stones to be supplied, Mr. Gardam replied that the exact figures would be calculated after the level of the sand-filled channel had been determined pursuant to clause 1 of Part V of the sub-contract. Mr.

A Gardam was then asked to explain clause 2 of Part I of the sub-contract which reads:—

"The sub-contractor agrees to execute or omit to execute any item of the works mentioned above as ordered by the employer or contractor by way of measured variation at unit rate prices stated above. Quantities stated above shall not be taken to define or limit the extent of any work to be done by the sub-contractor in the execution and completion of the above sub-contract works."

B He said that this clause meant that the Claimants had to complete the sub-contract works notwithstanding that the design volumes had been exceeded but the Respondents would not be liable to pay for the additional stones which the Claimants would have to supply to complete the works. This was because of the wording of clause 16 of Part IV of the sub-contract read with clause 46 of the specifications of the main contract, the relevant portions of which read as follows:—

"Part IV (of sub-contract)

16. Claims for work done under the sub-contract by the sub-contractor or for other benefits under the sub-contract against the contractor are only payable, if the same are payable by the employer under the main contract.

E The contractor and the sub-contractor shall render each other all assistance in making claims abovementioned against the employer.

F On recovering of claims from the employer the contractor shall pay the same over to the sub-contractor, less a fair proportion representing the contractor's overhead cost and profit, not exceeding 15% of the amount paid by the employer to the contractor.

G 46. (Of specifications in main contract) The contractor shall allow in his Tender for losses due to settlement, waive action, etc. as no extra payment can be entertained."

H Mr. Gardam added that as the Claimants were bound by all the terms and conditions relating to the sub-contract works contained in the main contract by virtue of clause 2 of Part II of the sub-contract, they should have allowed in their quotation for losses due to settlement, waive action etc. and if they did not do so they could not complain now as they should have been fully aware that no extra payment could be entertained for such losses. According to Mr. Gardam this again illustrated how condition (i) in Claimants' letter dated February 7, 1974 conflicted with the terms and conditions in the main contract and sub-contract.

I Clause 2 of Part II and clause 20 of Part IV of the sub-contract read as follows:—

"Part II

2. Application and Incorporation of Terms of the Main Contract to the sub-contract

All terms and conditions relating to the sub-contract works contained in the main contract which are not repugnant or inconsistent with this sub-contract, shall apply and bind the sub-contractor under this sub-contract as if the same were severally set out herein.

Part IV

20. In case of any conflict between the terms contained in this sub-contract and the terms contained in the main contract, the terms in this sub-contract shall prevail over the terms contained in the main contract."

These two clauses are important in view of the fact that the main contract is a lump sum contract and the sub-contract is a unit rate contract. Therefore unless it is clearly stated in the sub-contract one must not assume that the sub-contractor agreed to undertake the risks that the contractor accepted under the main contract. Even greater caution should be exercised when it is apparent that the sub-contractor has indicated in writing that he wished to avoid such risks, as in this case, by requiring to be paid for the stones by pontoon loads. So I am not prepared to accept the hidden meanings given to the wording of the sub-contract by Mr. Gardam.

Does condition (i) in page 2 of the Claimants' letter dated February 7, 1974 conflict with other terms and conditions of the sub-contract? I do not think so. The representatives of the Claimants and the Respondents held several meetings between January and April 1974. On January 26, 1974 the Claimants sent to the Respondents a first quotation with which we are not concerned. According to the Arbitrator (page 28 of the Award) there were subsequent meetings which culminated in an agreement described in the Claimants' revised quotations of February 7 and April 15, 1974 - letters which were subsequently accepted and incorporated in the sub-contract agreement of July 13, 1974.

According to Mr. C.S. Wu, junior counsel for the Respondents, the Claimants' letters dated February 7, 1974 and April 15, 1974 were forwarded at the conclusion of the negotiations to the Claimants' solicitor to be incorporated into the sub-contract.

The Claimants' solicitor then drafted the sub-contract in his own brand of English, inserting therein certain items from these two letters which he thought should appear in the body of the sub-contract and listing other matters which should form part of the sub-contract in the Appendix attached thereto. The Claimants' letter of February

A 7, 1974 is listed as item 7 of the Appendix.

In my opinion, the Respondents should have stated clearly during the negotiations that condition (i) in page 2 of the Claimants' letter of February 7, 1974 regarding the measurement of Class A and B stones by pontoon loads was not acceptable to them, in which event the Claimants would no doubt have revised again their quotations contained in page 1 thereof to allow for losses due to over-dumping, subsidence, wave action etc. By keeping quiet and giving the Claimants the impression that all the conditions in their letter of February 7, 1974 were acceptable, the Respondents were, in fact, denying the Claimants an opportunity to revise again their quotations. The Respondents cannot now claim that they did not accept the conditions relating to pontoon loads measurements of Class A and B stones. I would be condoning a fraud on the Claimants if I accepted the Respondents' contention that they had not agreed that the Class A and B stones should be measured by the pontoon loads before discharge.

The Claimants were given by the Respondents the approximate quantities of Class A and B stones they were required to supply and place on the filter cloth and in their revised quotations the prices they quoted were \$34.60 per cubic metre for Class A stones and \$39.40 per cubic metre for Class B stones. Obviously if the quantities of Class A and B stones were significantly less than the approximate figures given, the Claimants would have charged more for the stones they were required to supply and place. The Claimants' revised quotations were based on the condition that the Class A and B stones supplied should be measured by the pontoon loads. This condition is not inconsistent with the language of Part I of the sub-contract in view of clause 2 thereof which specifically provides that the quantities stated in clause 1 shall not be taken to define or limit the extent of any work to be done by the sub-contractor to complete the sub-contract works. Under clause 2, the sub-contractor agrees to execute or omit to execute any of the items of the works mentioned in clause 1 and any such works executed by the sub-contractor under the orders of the contractor or employer shall be paid for as a measured variation at the unit rate prices stated in clause 1; and clause 2 of Part III of the sub-contract explains this matter further by stating that all authorised variations of the sub-contract works shall be valued in the manner provided therein i.e. in accordance with the unit rate prices set out in Part I, and the value thereof shall be added to or deducted from

the sum specified in Part I of the sub-contract. It should be noted that the only deduction from the sums set out in Part I authorised by this sub-contract is when the sub-contractor has been ordered to omit to do any item of the works mentioned in clause 1 thereof – not when the design volume measurements are found to be less than the approximate figures given in clause 1, as alleged by Mr. Gardam. In the above premises, it is my view that the words “according to all contract drawings and as specified” in paragraphs (1) and (2) of sub-clause (a) of clause 1 of Part I of the sub-contract only apply to the word “place” and do not refer to the word “supply” appearing at the beginning of the said paragraphs, otherwise these two paragraphs cannot be reconciled with other provisions in the sub-contract as well as with the agreement between the parties to measure the stones by pontoon loads.

For the above reasons, my answer to Question 1 is that on a proper construction of the sub-contract, the prices for the supply and placing of Class A and B stones should be based on pontoon loads measurements as contended by the Claimants.

Question 2: Whether on a proper construction of the sub-contract, the price for the laying/placing of filter cloth should be based on the actual quantity of filter cloth supplied by the Defendants (Respondents) to the Plaintiffs (Claimants) as the Plaintiffs (Claimants) contend, or on design area as the Defendants (Respondents) contend.

Question 3: Whether on a proper construction of Part V clause 1(iii)(b) of the sub-contract the Plaintiffs (Claimants) have to pay for the cost of the filter cloth used in excess of 20% over the “designed” area.

Mr. Garland for the Claimants submitted that the Claimants laid the filter cloth in accordance with the shop drawings issued by the Respondents’ engineers and that the price for laying the filter cloth should be based on the actual quantity of the filter cloth required to be laid under the said shop drawings measured net. In the original contract drawings the design area measured net was approximately 208,000 sq. metres. However, there was a certain amount of overdumping of Class A stones during the placing of the stones and to prevent leaching the overdumped stones had to be covered with filter cloth before the reclamation material was placed on the landward slope of the stone bund. This was provided for by the shop drawings under which the net quantity of

- A filter cloth required to be laid was 272,000 sq. metres. Several clauses in the main contract required the filter cloth to overlap by not less than one metre in every direction. The amount of filter cloth which had to be laid was bound to exceed the design area for another reason i.e.
- B the level of the sand fill in the trench was uneven necessitating more filter cloth to be laid over the surface of the sand. So the actual quantity of filter cloth used was 303,000 sq. metres.

- C As regards Question 2, Mr. Garland said that the Claimants were entitled to be paid for laying the actual quantity of filter cloth required to be laid under the shop drawings, measured net. As regards Question 3, as the Respondents in Part V clause 1(iii)(b) of the sub-contract had given a 20% allowance for accidental loss of filter cloth,
- D the Claimants were not required to make good any loss of filter cloth because such loss was minimal and well below the aforesaid 20% allowance.

- E Mr. Gardam for the Respondents submitted that under clause 1 of Part I of the sub-contract, the Claimants undertook to place approximately 210,840 sq. metres of filter cloth according to all contract drawings and as specified @ \$2.50 per sq. metre. The design area to be covered by filter cloth according to the contract drawings measured 208,000 sq. metres net. The Respondents were not
- F liable to pay for any extra filter cloth required to be laid because of the uneven nature of the level of the sand bed and on account of the overlap and the necessity to cover the overdumped Class A stones. The Claimants should have allowed in their revised quotation for the cost of having to place extra filter cloth for the above reasons and should not
- G now come to claim a variation of the sub-contract based on the shop drawings.

- H As regards Question 3, Mr. Gardam said that the 20% allowance for accidental loss covered the losses sustained as a result of the need for overlapping, for covering completely the uneven surface of the sand bed and the overdumped Class A stones. So the Claimants would have to pay for the filter cloth used in excess of the design area of 208,000 sq. metres plus the 20% allowance given for accidental loss.

- I Clause 2 of Part 1 of the sub-contract states clearly that the quantities stated in clause 1 shall not be taken to define or limit the extent of any work to be done by the sub-contractor to complete the sub-contract works. The quantities stated in

clause 1 were varied by the shop drawings issued by the Respondents' engineers and with which the Claimants had to comply and such variations of the work which the Respondents required the Claimants to do must be paid for at the unit rate prices stated in clause 1. This is provided for by clause 2 of Part I and by Part III of the sub-contract. Therefore the Claimants are entitled to be paid for placing 272,000 sq. metres of filter cloth according to the shop drawings.

As regards Question 3, as I have decided that the shop drawings issued by the Respondents' engineers to the Claimants in respect of the filter cloth constituted a variation of the work to be carried out by the Claimants and were requirements which the Claimants had to comply with, the Respondents were obliged to supply the Claimants with 272,000 sq. metres of filter cloth plus 20% more to cover accidental loss.

For the above reasons my answer to Question 2 is that on a proper construction of the sub-contract the price for laying the filter cloth should be based on the actual quantity of filter cloth required to be laid under the shop drawings measured net.

My answer to Question 3 is that on a proper construction of Part V clause 1(iii)(b) of the sub-contract, the Claimants do not have to pay for any filter cloth used by them in excess of the quantity they were required to lay in accordance with the shop drawings issued by the Respondents' engineers as such excess is less than the 20% allowance given by clause 1 of Part V of the sub-contract to cover accidental loss.

Question 4: Whether on a proper construction of specification 152 of the main contract and Part V clause 4 of the sub-contract the Plaintiffs' (Claimants) claim for wage escalation is limited to the maximum value of the original net sub-contract sum i.e. S\$15,513,979.00 as the Defendants (Respondents) contend.

Mr. Garland submitted that the words "original net tender sum" appearing in clause 152 of the specifications of the main contract did not apply to the sub-contract as the sub-contract claim was based on a measured value of the work actually done. So for the purposes of the sub-contract, clause 152 of the specifications in the main contract should read as follows:—

"In the event of an announcement of increase in wages by the National Wages Council during the currency of the contract, the contractor shall be entitled to claim for such increase as a variation to his contract. Such variation

A shall be computed based on a wage content of 15% of the value of the work actually executed following such increase."

Mr. Gardam in his reply pointed out that the Claimants' letter of February 7, 1974 referred to the escalation clauses in the main contract but did not try to vary clause 152 of the specifications. He therefore submitted that for the purposes of the sub-contract the relevant part of clause 152 of the specifications in the main contract should read as follows:—

B "Such variation shall be computed based on a wage content of 15% of the original tender sum for the sub-contract less value of work done."

C I am of the opinion that Mr. Garland's submission is not supported by any clause in either the main contract or the sub-contract.

D For the above reason, my answer to Question 4 is that on a proper construction of specification 152 of the main contract and Part V clause 4 of the sub-contract, the Claimants' claim for wage escalation is limited to the maximum value of the original net sub-contract sum i.e. S\$15,513,979.00.

E *Question 5:* Whether on a proper construction of Part V clause 16 of the sub-contract, the Plaintiffs (Claimants) are precluded from recovering the sum of \$47,971.06 as the Defendants (Respondents) contend.

F Mr. Garland for the Claimants submitted that as the Claimants had been asked by the Respondents to do the extra 7 con Rip-Rap facing the Claimants should be paid for it as a variation of the sub-contract.

Mr. Gardam in reply said that the letter from the Housing & Development Board to the Respondents dated July 13, 1976 reproduced below was clearly an approval of the Respondents' proposals and could not be regarded as a variation order; as the main contract works had not been varied it could not be said that the sub-contract works had been varied by the approval contained in the aforesaid letter. This letter dated July 13, 1976 reads as follows:—

G "M/s Penta-Ocean Constr. Co. Ltd. & Ohbayashi-Gumi Ltd.
Tunas Bldg (21st floor)
114 Anson Road
Singapore 2

H I Dear Sirs

EAST COAST RECLAMATION SCHEME, PHASE V
TELOK AYER BASIN
RE: RIP-RAP FACING WORKS

Please refer to your letter POJV/HDB/1555 dated June 23, 1976.

2. This is to inform you that your proposal to provide additional 7 cm thick stone layer for the rip rap facing to allow for possible future settlement at your own expense is approved.

3. Notwithstanding the above approval you are still fully responsible for making good any settled rip rap facing stone due to settlement of fill etc. during the construction period, the maintenance period and for a period of two years commencing from the expiry date of the Period of Maintenance.

4. For your attention, please.

Yours faithfully

sd: Ho Siew Koon
Senior Civil Engineer
Housing & Development Board"

Page 14 of the Arbitrator's Award contained the following facts:—

"Addition of 7 cm of Rip-Rap Facing (Claim for \$47,971.06)

- (a) Specification Clause 47 sub-paragraph 5 of the Main Contract required Respondents to allow for loss for Rip-Rap stones due to settlement of fill. Respondents contend that this provision was incorporated in the sub-contract by virtue of Part II Clause 1 and 2 of the sub-contract.
- (b) In or about early June 1976, Respondents' Mr Ikuyama discussed this requirement with Claimants' Project Controller, Mr Chiang Shih Fang, and it was orally agreed between them that in construction of Rip-Rap Facing, Claimants would provide for a settlement of fill. Following this oral agreement, Respondents' Mr Ikuyama spoke to Mr Ho Siew Koon, HDB's Senior Civil Engineer, who agreed to a provision of 7 cm as allowance for subsidence of fill. This latter agreement was conveyed to Claimants by letter dated July 20, 1976."

In my view, as the Claimants had agreed to provide Rip-Rap stones to make up for the loss due to settlement of fill they cannot now claim to be entitled to be paid for the extra 7 cm of Rip-Rap facing.

In the above circumstances, my answer to Question 5 is that the Claimants are precluded from recovering the sum of \$47,971.06 as they had agreed to allow for loss of Rip-Rap stones due to settlement of fill.

Question 6: Whether on a proper construction of the provisions of the sub-contract, the Plaintiffs (Claimants) are precluded from recovering the sum of \$149,477.61 as the Defendants (Respondents) contend.

A In a letter dated November 24, 1973 to the Housing & Development Board the Respondents undertook to change the facing stone work of the stone bund to armouring stones between certain chainages and also confirmed that the facing stones would be placed evenly to the lines, levels and slopes as shown on the drawings. Paragraph 10 of the aforesaid letter reads as follows:—

B "We undertake to change the facing stones of the Stone Bund between 0.00 m ACD and + 1.50 m ACD with armouring stones, each piece shall not be less than 500 kg, from B Ch. 1379.00 metres to B Ch. 4298.54 metres and from A Chainage 0.00 metres to A Chainage 1200 metres. The armouring stones shall be placed to the lines, levels and slopes as shown on our drawings so that each interlocks with the other on the face and any loose parts likely to be disturbed by the action of waves shall be removed and replaced until a compact and firm face is obtained.

C D We also undertake to place the facing stones for Stone Bund between 0.00 m ACD and + 1.50 m ACD evenly to the lines, levels and slopes as shown on our drawings from A-chainage 1200.00 metres to A-chainage 1740.29 metres and from B-chainage 128.98 metres to B-chainage 795.92 metres."

E This letter was subsequently incorporated in the main contract at pages 228 and 229 thereof. The Claimants were given a copy of the main contract on the May 20, 1974. The only reference to the armouring stones made by the Claimants is contained in the Claimants' letter dated April 15, 1974 which forms part of the sub-contract. The relevant portion of Claimants' letter of April 15, 1974 reads as follows:—

F "Messrs. Ohbayashi-Gumi Ltd.
S.I.A. Building
Singapore

G Dear Sirs,

Re: East Coast Reclamation Phase V (Telok Ayer Basin)

H We write further to our letter dated February 7, 1974 and subsequent discussions with your representatives and Mr A.C. Toh, we are pleased to confirm the following:—

(a) *ARMOURING STONES*

I We are prepared to carry out Armouring Stone work up to 10,000 cu. meter at the same rate as Class "A" stone (\$34.60 per cu. m.). In the event the quantity exceeds 10,000 cu. meter limit, a new rate shall be agreed upon for additional work."

Mr. Garland for the Claimants referred to page 50 of the Arbitrator's Award where the Arbitrator found that the finish of the facing stones was of a higher standard than was required by the contract

documents. According to Mr. Garland, the Arbitrator found on a balance of probabilities that there was an oral variation requiring this better finish. If there was such an oral request to provide a better finish than was required by the sub-contract, the Claimants should be paid for this extra work.

In reply, Mr. Gardam for the Respondents said that the Claimants in their letter dated April 15, 1974 proposed that a new rate should be agreed upon for additional work in the event the quantity of armouring stone works exceeded 10,000 cubic metres. The Claimants did not ask for extra payment for the work required to place Class A stones evenly as agreed upon in the Respondents' letter of November 24, 1973 which forms part of the main contract. The Claimants' letter dated July 8, 1977 claiming for extra payment for placing Class A stones evenly did not set out any ground in support of their claim. There was no evidence of any oral variation of the sub-contract. In any case, Part III of the sub-contract only dealt with variations ordered in writing by the contractor or confirmed in writing to the sub-contractor by the contractor and it was not disputed there was no variation order in writing in this connection.

In my view, the Claimants are not entitled to be paid any additional sum for the extra work they carried out to change the facing stones of the stone bund with armouring stones because there is no evidence of any variation order, oral or in writing in connection therewith.

In the above premises, my answer to Question 6 is that on a proper construction of the provisions of the sub-contract the Claimants are precluded from recovering the sum of \$149,477.61.

Accordingly, I order that judgment be entered for the Plaintiffs/Claimants in the sums of \$1,646,010.01 for the supply and placing of Class A and B stones, of \$160,386.10 for the placing of filter cloth and of \$261,875.95 in respect of the cost of filter cloth.

The Claimants to get 70% of the taxed costs of the Arbitration proceedings as well as of this application. Costs for two counsel allowed in the hearing of this application.

Order accordingly.

Solicitors: *Yap & Yap; Donaldson & Burkinshaw.*

A MALAYSIAN REPORTS

**YAP YOKE LUAN & ORS.
v. ONG WEE TOK & ORS.**

[F.C. (Salleh Abas C.J., George Seah & Syed Agil Barakbah F.JJ.) August 25 & October 19, 1983]
[Kuala Lumpur – Federal Court Civil Appeal No. 284 of 1982]

Contract – Purchase of land belonging to estate of deceased person – Sale subject to leave of court – Objection by beneficiaries – Leave not given – Delay in application to court

Probate and Administration – Sale of land belonging to estate of deceased person – Sale subject to leave of court – Objection by beneficiaries – Leave not given

In this case the first and second respondents, as the administrators of the estate of a deceased person, had agreed to sell land belonging to the estate to the appellants. The sale was subject to obtaining leave of the court. The administrators delayed in applying for leave, but in the meantime the appellants were allowed vacant possession of the land. The appellants subsequently obtained an order from the High Court ordering the administrators to apply to the court for leave to sell and transfer the land. The administrators therefore filed an application to court for leave. The beneficiaries were cited as respondents and the appellants applied to be added as interveners. The application was dismissed by the learned judge as the beneficiaries opposed the application on the grounds *inter alia* that the agreed purchase price was grossly below the market value. The appellants appealed.

Held: (1) the appellants as the proposed purchasers under a conditional contract were perfectly well aware that their contract had to be approved by the court before it could be carried into effect and they had taken the risk of losing their bargain if the court refused to grant such approval;

(2) the duty of the court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchasers. In exercising its discretion the court will have to look into the facts and surrounding circumstances of the case, that is whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price. The court is concerned that the price is a reasonable one not at the time the offer was made but at the time of the hearing of the application for approval of the proposed sale;

(3) in this case the purchase consideration was manifestly low in the light of the valuation of the land at the material time and the learned judge was correct in dismissing the applications;

(4) in this case the appellants had delayed in their application to court for relief and there was no reasonable excuse for them to have been inactive for such a long period without seeking relief.